IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1596

VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION, THE COMMONWEALTH OF VIRGINIA, AND THE TOWN OF WISE, VIRGINIA,
Appellants,

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR.

On Appeal from the United States District Court For the Western District of Virginia

JURISDICTIONAL STATEMENT

MARSHALL COLEMAN
Attorney General
Commonwealth of Virginia

JOHN L. KILCULLEN
1800 M Street, N.W.
Washington, D.C. 20036

For the Virginia Surface Mining and Reclamation Assn., and the Town of Wise, Virginia

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INDEX

	Page
JURISDICTIONAL STATEMENT	1
OPINION BELOW	2
CONSTITUTIONAL AND STATUTORY PROVISIONS	2
QUESTION PRESENTED	2
STATEMENT OF THE CASE	3
THE QUESTION IS SUBSTANTIAL	3
CONCLUSION	7
APPENDIX A	1a-2a

TABLE OF AUTHORITIES

CASES:

Appeal of Mutual Supply Co., 366 Pa. 424, 77 A.2d 612 (1951)	5
Berman v. *Parker*, 348 US 26 (1954)	5
City of Euclid v. *Ambler Realty Co.*, 272 US 365 (1926)	5
Construction Industry Assn. v. *City of Petaluma*, 522 F.2d 897 (9th Cir. 1975), cert. den. 424 US 934	5
Federal Power Commission v. *Oregon*, 349 US 435 (1955)	6
Gage v. *Atomic Energy Comm.*, 479 F.2d 1214 (D.C. Cir. 1973)	6
Geer v. *Connecticut*, 161 US 793 (1896)	6
Kane v. *Kreiter*, 25 Ohio 2d 295, 143 N.E. 2d 829 (1963)	5
Kansas v. *Colorado*, 206 US 46 (1906)	6

Page

Kleppe v. *New Mexico*, 426 US 529 (1976) 6

McCready v. *Virginia*, 94 US 391 (1877) 6

Midland Electric Coal Corp. v. *Knox County*, I Ill. 2d 200, 115 N.E. 2d 275 (1953) 5

Moore v. *Hampton Roads Sanitation Commission*, 557 F.2d 1030, 1038 (1977) 6

Penn Central Transportation Co. v. *New York City*, 438 US 104 (1978) 5

United States v. *Arizona*, 295 US 174 (1935) 6

United States v. *Raines*, 352 US 17 (1960) 3

Village of Belle Terre v. *Boraas*, 416 US 1 (1974) 5

West Brothers Brick Co. v. *Alexandria*, 169 VA 271 (1937) 5

CONSTITUTION, STATUTES AND REGULATIONS:

United States Constitution:

Article I, section 8 .....1, 2, 5, 6, 7

Fifth Amendment 2

Tenth Amendment 2

Federal Mine Safety and Health Act of 1977, 30 U.S.C. Section 801, et seq. 4

Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, 30 U.S.C. (Supp. I) 1201 et seq... 2, 4

Section 501 *et seq.* 30 U.S.C. (Supp. I) 1251 *et seq.* 3

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No. ———

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On Appeal from the United States District Court For the Western District of Virginia

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JURISDICTIONAL STATEMENT

This is a cross-appeal brought by the Commonwealth of Virginia, the Town of Wise, Virginia, and the Virginia Surface Mining and Reclamation Association from a judgment of the District Court for the Western District of Virginia insofar as such judgment holds that the Commerce Clause of the United States Constitution empowers Congress to regulate the use of private non-federal lands within a State. The implications of such a holding raise powerful constitu-

tional questions which should be examined by this Court. Jurisdiction of this Court is invoked under 28 U.S.C. 1252.

OPINION BELOW

The Memorandum Opinion and Order of the district court, issued on January 3, 1980, together with the district court's supplemental memorandum and order dated January 21, 1980, are printed in the Appendix to the Jurisdictional Statement of Appellant, Secretary of the Interior, filed with this Court on April 1, 1980. Such Appendix is relied on for purposes of this Statement. The Commonwealth of Virginia, the Town of Wise, Virginia, and the Virginia Surface Mining and Reclamation Association filed a notice of appeal to this Court on February 11, 1980, with the Clerk of the District Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth and Tenth Amendments to the Constitution of the United States, and the relevant provisions of the Federal Surface Mining Control and Reclamation Act of 1977, are printed in the Appendix to the Jurisdictional Statement of the Secretary of the Interior, and such Appendix is relied upon for the purpose of this Statement.

QUESTION PRESENTED

Whether the provisions of the Federal Surface Mining Control and Reclamation Act which interpose federal regulatory controls on the use of private nonfederal lands within a State constitute a valid exercise of the power of Congress under the Commerce Clause of the Constitution?

STATEMENT OF THE CASE

Cross-appellants herein, plaintiffs below, brought this action seeking a declaratory judgment that the provisions of title V of the Federal Surface Mining Control and Reclamation Act (hereinafter the Act) which establish a scheme of federal controls on the use of private non-federal lands within a State, and upon the exercise of individual rights in and to real property, are in excess of the power of Congress to regulate interstate commerce, and are not grounded upon any of the other enumerated powers granted to the federal government by the Constitution.

Although the district court found that certain sections of the Act unconstitutionally interfere with reserved State powers under the Tenth Amendment, as well as with property rights under the Fifth Amendment, the court in its January 3, 1980 Order ruled that: *"Title V of the Surface Mining Control and Reclamation Act is hereby declared to be a valid exercise of the power of Congress to regulate interstate commerce and is rationally based."* Appendix, p.18a. It is this portion of the court's judgment which is the subject of this cross-appeal.[1]

THE QUESTION IS SUBSTANTIAL

The Act in its major features establishes a preemptive program of federal regulatory controls respecting

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[1] The ruling of the district court relative to other issues raised by plaintiffs under the Fifth and Tenth Amendments is the subject of the appeal filed herein by the Secretary of the Interior. No. 79-1538. This Court has noted that where an appeal is filed under 28 USC 1252 Congress intended that "the whole case come up," and the Court has the power to pass on questions raised by a cross-appeal. *United States* v. *Raines*, 352 US 17 (1960).

land use and land reclamation, and thrusts the federal government for the first time into a sphere of regulatory activity which has heretofore been regarded as exclusively within the powers of the States and their political subdivisions.

The main thrust of the Act is directed at control of land use for surface coal mining, with particular emphasis upon the post-mining condition and utilization of land areas disturbed by surface coal mining, and bears only indirectly or peripherally upon the commerce aspects of surface coal mining. The regulatory scheme of the Act in its overall effect is to drastically restrict (and in substantial part prohibit) the beneficial use of land and recovery of mineral resources vital to the economic and social well-being of the local communities and people in many coal producing regions, particularly those situated in the State of Virginia.

In contrast to other federal mining legislation, such as the Federal Mine Safety and Health Act of 1977[2] which deals with the safety and health of miners employed in production of coal and other minerals for interstate commerce, the Surface Mining Act is directed not to the "commerce" aspects of surface mining, i.e. the operations involved in extraction, transportation and sale of surface mined coal, but deals entirely with aspects of land use. By imposing federal controls upon land use for surface mining, and dictating criteria for reclamation of land areas after active mining has ceased, Congress has in effect transferred to a federal agency the traditional authority of State and local governments in respect to these functions, and has created a comprehensive body of federal police

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[2] 30 USC 801 *et seq.*

powers designed to supplant the inherent police powers of State and local governments to provide for the protection of the individual citizen in his person as well as in his property rights. It is in this context that valid questions are presented as to whether the Act constitutes a genuine exercise of the commerce power, or whether the commerce power is simply a cloak for assumption of federal control of land use functions and police powers not heretofore recognized as within the authority of the government under the Commerce Clause.

Regulation of private land use has been consistently held to be within the inherent police powers of the States and the counties, cities and towns which comprise their political subdivisions. *City of Euclid* v. *Ambler Realty Co.,* 272 US 365 (1926); *Berman* v. *Parker,* 348 US 26 (1954); *Village of Belle Terre* v. *Boraas,* 416 US 1 (1974); *Penn Central Transportation Co.* v. *New York City,* 438 US 104 (1978); *Construction Industry Assn.* v. *City of Petaluma,* 522 F.2d 897 (9th Cir. 1975), cert. den. 424 US 934; *West Brothers Brick Co.* v. *Alexandria,* 169 VA. 271 (1937). Similarly, the power to authorize or restrict mining operations on lands within a State has heretofore been exercised exclusively by the States, counties and municipalities, and their designated agencies. See, e.g. *Midland Electric Coal Corp.* v. *Knox County,* 1 Ill. 2d 200, 115 N.E. 2d 275 (1953); *Appeal of Mutual Supply Co.,* 366 Pa. 424, 77 A.2d 612 (1951); *Kane* v. *Kreiter,* 25 Ohio 2d 295, 143 N.E. 2d 829 (1963). See also, 10 ALR 3d 1226, and cases there cited. The federal government has not, prior to this Act, claimed any supervening authority in this area.

It is undeniable that coal is a commodity which moves in interstate and foreign commerce, and is subject to regulation by Congress under the Commerce Clause. The issue here, however, is not simply a question of regulation of a commodity which moves in interstate commerce, but whether the power to regulate commerce carries with it the power to regulate the real estate incident to production of such commodity.

This question was long ago dealt with by this Court in *McCready* v. *Virginia,* 94 U.S. 391 (1877), in which the Court noted that "Commerce has nothing to do with land while producing, but only with the product after it has become the subject of trade." 94 U.S. at 396. This comment from the *McCready* case has recently been cited with approval by the Court of Appeals for the Fourth Circuit in *Moore* v. *Hampton Roads Sanitation Commission,* 557 F.2d 1030, 1038 (1977). Indeed, this Court has never held, nor even intimated, that land as such is subject to regulation under the Commerce Clause. In the relatively few cases in which the subject has been even touched upon the Court's language unmistakably recognizes the primacy and sovereignty of the States in this area. *Geer* v. *Connecticut,* 161 U.S. 793 (1896); *Kansas* v. *Colorado,* 206 U.S. 46 (1906); *United States* v. *Arizona,* 295 U.S. 174 (1935); *Federal Power Commission* v. *Oregon,* 349 U.S. 435 (1955); *Kleppe* v. *New Mexico,* 426 U.S. 529 (1976). In *Gage* v. *Atomic Energy Comm.,* 479 F.2d 1214 (D.C. Cir. 1973), the Court of Appeals for the District of Columbia Circuit held that were the Atomic Energy Commission to attempt to bar land acquisition by a utility company for construction of a nuclear power plant the question would be presented as to whether such action "impermis-

sibly interfered with traditional state powers over land use and utility land acquisition, or unconstitutionally preempted private rights of free alienation." 479 F.2d at 1220.

Diligent research reveals absolutely no judicial authority or precedent holding that the mere fact that the fruits of the land move in interstate commerce gives rise to federal regulatory powers under the Commerce Clause to dictate the uses of private lands within the jurisdiction of the several States.

CONCLUSION

The question presented here has enormous constitutional implications. If the Commerce Clause gives the federal government the power to regulate land use within the States there are no foreseeable limits upon the ultimate reach of that power. In a real sense this case presents the ultimate test of the principles of Federalism, and for this reason the Court should note probable jurisdiction.

Respectfully submitted,

MARSHALL COLEMAN
Attorney General
Commonwealth of Virginia

JOHN L. KILCULLEN
1800 M Street, N.W.
Washington, D.C. 20036

For the Virginia Surface
Mining and Reclamation Assn.,
and the Town of Wise, Virginia

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

Civ. No. 78-0224-B

VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION, INC. ET AL.,

Plaintiffs,

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,

AND

VIRGINIA CITIZENS FOR BETTER RECLAMATION, INC., ET AL.,

Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Filed February 11, 1980

Notice is hereby given that the Commonwealth of Virginia, the Town of Wise, and the Virginia Surface Mining and Reclamation Association, plaintiffs in this case, appeal to the Supreme Court of the United States from the order and judgment entered in this action on January 3, 1980, as supplemental and modified by order dated January 21, 1980.

This appeal is taken pursuant to 28 U.S.C. 1252 and 2101.

Respectfully submitted,

/s/ ROGER L. CHAFFE
Roger L. Chaffe
Assistant Attorney General
Commonwealth of Virginia
11 South 12th Street
Richmond, Virginia 23219
(804) 786-1348

/s/ JOHN L. KILCULLEN
John L. Kilcullen
Kilcullen, Smith & Heenan
1800 M Street, N.W. Suite 600N
Washington, D.C. 20036
(202) 296-5700
Attorneys for Virginia Surface Mining and Reclamation Association, Inc.

/s/ KENNETH T. ASBURY
Kenneth T. Asbury
Post Office Box 336
Wise, Virginia 24293
Attorney for Town of Wise

February 8, 1980

No. 79-1596

In the Supreme Court of the United States

OCTOBER TERM, 1979

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v.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA

MOTION TO AFFIRM

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA

MOTION TO AFFIRM

The Solicitor General, on behalf of the Secretary of the Interior, moves to affirm the relevant portion of the judgment of the district court.

OPINIONS BELOW

The main opinion of the district court (J.S. App. 21a-75a) is reported at 483 F. Supp. 425.[1] A supplementary opinion of the district court, issued in response to the Secretary's motion for a stay (J.S. App. 4a-16a), is reported at 483 F. Supp. 448. The opinion of the court of

[1]Unless otherwise indicated, "J.S. App." refers to the Appendix to the Jurisdictional Statement filed by the Secretary of the Interior in No. 79-1538.

appeals at the preliminary injunction stage (J.S. App. 76a-85a) is reported at 604 F. 2d 312. The opinion of the district court at the preliminary injunction stage (J.S. App. 86a-101a) is not reported.

JURISDICTION

The final order of the district court (J.S. App. 17a-20a) was entered on January 3, 1980. An amending order (J.S. App. 1a-3a) was entered on January 21, 1980. The Secretary of the Interior filed a notice of appeal to this Court on February 1, 1980 (J.S. App. 102a-104a). Appellants filed a notice of appeal to this Court on February 11, 1980 (79-1596 J.S. App. 1a-2a). The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8, of the Constitution provides in pertinent part:

> The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

The relevant portions of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. (Supp. I) 1201 *et seq.*, are reprinted in J.S. App. 106a-145a.

QUESTION PRESENTED

Whether Title V of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. (Supp. I) 1251-1279, exceeds the scope of the congressional power to regulate interstate commerce under Article I, Section 8, of the Constitution.

STATEMENT

This cross-appeal involves a broad challenge to the validity of Title V of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. (Supp. I) 1251-1279. Title V contains the statute's principal regulatory and enforcement provisions, including all the Act's mining performance standards, regulatory program procedures, permit system requirements, and specific enforcement measures.

The statute and the history of this litigation are fully described in 79-1538 J.S. 3-15. As noted there (*id.* at 8), appellants argued, *inter alia*, in the district court that Title V of the Surface Mining Act is invalid as a whole because it is beyond the scope of Congress' power to regulate interstate commerce under Article I, Section 8, of the Constitution. The district court rejected this general challenge to Title V, holding that "Congress' enactment of the federal surface mining act is within the scope of the commerce clause" (J.S. App. 26a).

The court acknowledged and deferred to the express congressional findings in Section 101(c) of the Act, 30 U.S.C. (Supp. I) 1201(c), that surface mining operations adversely affect interstate commerce in several specific ways (J.S. App. 26a-27a & n.1). See also 30 U.S.C. (Supp. I) 1201(j). The court recognized that its role was limited to determining whether Congress had a "rational basis" for enacting a particular regulatory scheme for the protection of commerce (J.S. App. 28a). The court then explained (*id.* at 28a-29a; footnote omitted):

> There is no question that coal moves in interstate commerce and that its production has a substantial effect on the national economy. * * * The Surface Mining Control and Reclamation Act of 1977 is an attempt by Congress to insure that surface mining of

> this valuable commodity is accomplished with regard to its impact on interstate commerce and the public welfare. Congressional recognition of the enormous and multi-faceted implications for commerce of improper reclamation * * * pervades the act's legislative history. Congress considered improper surface mining and reclamation a threat to the productivity of the mined land in terms of its ability to support other important forms of commerce. * * * If the land is not reclaimed in a manner that subjects it to further use, then the productivity of that land is lost to present as well as future generations, reducing the flow of other valuable items in interstate commerce.

Emphasizing the potential environmental costs of unreclaimed or improperly reclaimed mining land, the district court concluded (*id.* at 29a) that "Congress had a real and substantial rational basis for enacting the federal surface mining act to protect commerce and the national interest."

ARGUMENT

The decision of the district court rejecting appellants' wholesale attack on Title V of the Surface Mining Act is correct, and appellants' Commerce Clause argument does not present a substantial federal question that merits this Court's attention. Accordingly, the judgment of the district court should be affirmed to the extent it holds that Title V does not exceed the scope of Congress' power to regulate interstate commerce.

The Commerce Clause grants Congress plenary power "to regulate commerce * * * among the several states * * *." *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *National League of Cities* v. *Usery*, 426 U.S. 833, 840

(1976); *Cleveland* v. *United States*, 329 U.S. 14, 19 (1946). This power is "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." *Gibbons* v. *Ogden, supra*, 22 U.S. (9 Wheat.) at 196. In particular, this Court has repeatedly held that the Commerce Clause power extends not only to "the use of channels of interstate or foreign commerce" and "protection of the instrumentalities of interstate commerce * * * or persons or things in commerce," but also to "activities affecting commerce." *Perez* v. *United States*, 402 U.S. 146, 150-152 (1971), and cases there cited.

In determining whether a particular exercise of power is valid under the Commerce Clause, a reviewing court must defer to a finding by Congress that the regulated activity affects interstate commerce, if there is any rational basis for that finding. *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 33-34 (1976); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 258 (1964); *Katzenbach* v. *McClung*, 379 U.S. 294, 303-304 (1964); *United States* v. *Appalachian Power Co.*, 311 U.S. 377, 424 (1940). If there is a rational basis for such a finding, the only remaining question for judicial consideration is whether the means selected by Congress for the regulation of commerce are "reasonable" and "rational." *Heart of Atlanta Motel, Inc., supra*, 379 U.S. at 258-259; *Katzenbach* v. *McClung, supra*, 379 U.S. at 304. Once a court determines that Congress acted rationally in adopting a particular regulatory scheme, the judicial inquiry is completed. *Ibid.*

Appellants concede (J.S. 6) that coal is a commodity that moves in interstate commerce. They contend, however, that "the Surface Mining Act is directed not to the 'commerce' aspects of surface mining, i.e. the

operations involved in extraction, transportation and sale of surface mined coal, but deals entirely with aspects of land use" (J.S. 4). The asserted distinction between permissible regulation of "operations involved in extraction * * * of surface mined coal," on the one hand, and impermissible regulation of "aspects of land use," on the other, is unclear, and, in any event, appellants' argument involves a significant mischaracterization of the regulatory provisions contained in Title V of the Act. Moreover, appellants have failed to allege that any specific section of Title V has been applied to them in a particular factual setting. Their abstract challenge to the constitutionality of an entire federal regulatory program does not present any concrete legal issue that is ripe for adjudication.

Contrary to appellants' apparent contention, the regulatory scheme created by Title V is primarily concerned with "operations involved in extraction * * * of surface mined coal." That is the very subject with which the statute was intended to deal. Congress based its decision to adopt the Surface Mining Act on express findings that the methods used in extracting coal frequently have a direct and adverse impact on interstate commerce. These findings are set forth in detail in Section 101 of the statute itself (30 U.S.C. (Supp. I) 1201(c), (e), (g), (h), and (j)), and the legislative history of the Act includes numerous additional references to the undesirable effects of surface mining practices on the environment and the public health and safety. See, *e.g.*, H.R. Rep. No. 95-218, 95th Cong., 1st Sess. 58-60 (1977); S. Rep. No. 95-128, 95th Cong., 1st Sess. 50 (1977). Appellants have offered no basis for concluding either that Congress' findings are irrational or that the means chosen for controlling the adverse impacts of surface coal mining are ill-suited to the task. The federal courts have

uniformly held that the power conferred by the Commerce Clause is broad enough to permit Congress to regulate activities giving rise to air pollution, water pollution, or other environmental hazards,[2] and appellants do not dispute that the kinds of problems identified by Congress can appropriately be addressed through Commerce Clause legislation. In these circumstances, there is no substantial constitutional question remaining to be decided.

The Surface Mining Act does not require that land be used in any particular way. It does not require that coal be mined and it does not prohibit the surface mining of coal, except in certain narrowly defined situations. It also does not mandate a particular postmining land use once the operator's performance bond has been released. The Act provides only that mining operations must be conducted subject to certain precautions and restrictions, and, if surface mining methods are used, mined land must be restored to its approximate original contour at the completion of mining activities. Appellants' charge that the Act was intended to control land-use decisions by private property owners is simply inaccurate.

Appellants' assertion (J.S. 4-5) that, by enacting Title V, Congress has "created a comprehensive body of federal police powers designed to supplant the inherent police

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[2]See, *e.g.*, *United States* v. *Byrd*, 609 F. 2d 1204, 1209-1210 (7th Cir. 1979); *Sierra Club* v. *EPA*, 540 F. 2d 1114, 1139 (D.C. Cir. 1976), cert. denied, 430 U.S. 959 (1977); *Bethlehem Steel Corp.* v. *Train*, 544 F. 2d 657, 663 (3d Cir. 1976), cert. denied, 430 U.S. 975 (1977); *District of Columbia* v. *Train*, 521 F. 2d 971, 988 (D.C. Cir. 1975); *United States* v. *Ashland Oil and Transp. Co.*, 504 F. 2d 1317, 1325 (6th Cir. 1974); *Pennsylvania* v. *EPA*, 500 F. 2d 246, 259 (3d Cir. 1974); *South Terminal Corp.* v. *EPA*, 504 F. 2d 646, 677 (1st Cir. 1974); *United States* v. *Bishop Processing Co.*, 287 F. Supp. 624 (D. Md. 1968), aff'd, 423 F. 2d 469 (4th Cir.), cert. denied, 398 U.S. 904 (1970).

powers of State and local governments" adds nothing to their argument. As this Court has stated, "[i]t is no objection to the assertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states." *United States* v. *Darby*, 312 U.S. 100, 114 (1941); *Cleveland* v. *United States*, *supra*, 329 U.S. at 19; *FPC* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 582 (1942); *United States* v. *Carolene Products Co.*, 304 U.S. 144, 147 (1938). The authority of the federal government over interstate commerce does not differ in extent or character from that retained by the states over purely intrastate commerce. *United States* v. *Darby*, *supra*, 312 U.S. at 116; *United States* v. *Rock Royal Co-operative*, 307 U.S. 533, 569-570 (1939). Moreover, as this Court has recently reaffirmed (*National League of Cities* v. *Usery*, *supra*, 426 U.S. at 840), Congress, in regulating private activities that affect interstate commerce, may pre-empt state laws that are contrary to the federal regulatory scheme. In particular, the Commerce Clause authorizes Congress to pre-empt state police power regulations that are inconsistent with the federal statute governing surface coal mining activities.[3]

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[3]Appellants have cited no pertinent authority in support of their argument that the Surface Mining Act is outside the scope of Congress' power under the Commerce Clause. Several of the cases to which appellants refer (J.S. 5) merely held that regulation of private land use is within the inherent police powers of the states and their political subdivisions, but these cases in no way suggest that such powers are exclusive or that the federal government may not regulate private activities that affect interstate commerce. The other decisions cited by appellants (J.S. 6) hold only that the states retain authority to regulate activities that do not affect interstate commerce and activities that may affect interstate commerce but concerning which Congress has not chosen to legislate.

CONCLUSION

The judgment of the district court should be affirmed to the extent it rejects appellants' Commerce Clause challenge to Title V of the Surface Mining Act.

WADE H. MCCREE, JR.
Solicitor General

JUNE 1980

DOJ-1980-06

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Appellants,

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Appellee.

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BRIEF OF THE STATES OF HAWAII, IDAHO, INDIANA, LOUISIANA, NEBRASKA, NEVADA, OKLAHOMA AND OREGON, AMICI CURIAE, IN SUPPORT OF THE JURISDICTIONAL STATEMENT

WAYNE MINAMI
Attorney General
JOHN H. WONG
Deputy Attorney General
State of Hawaii

DAVID H. LEROY
Attorney General
State of Idaho

THEODORE L. SENDAK
Attorney General
JACK R. O'NEILL
Deputy Attorney General
State of Indiana

WILLIAM J. GUSTE, JR.
Attorney General
CARMACK T. ACKMON
Assistant Attorney General
State of Louisiana

PAUL L. DOUGLAS
Attorney General
JUDY K. HOFFMAN
Assistant Attorney General
State of Nebraska

RICHARD H. BRYAN
Attorney General
State of Nevada

JAN ERIC CARTWRIGHT
Attorney General
State of Oklahoma

JAMES M. BROWN
Attorney General
State of Oregon

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

TABLE OF AUTHORITIES

CASES: PAGE

Federal Power Commission v. *Oregon*, 349 U.S. 435 (1955) 3

Kansas v. *Colorado*, 206 U.S. 486 (1906) 3

Kleppe v. *New Mexico*, 426 U.S. 529 (1976) 3

National League of Cities v. *Usery*, 426 U.S. 833 (1976). 4

Penn Central Transportation Co. v. *New York City*, 438 U.S. 104 (1978) 3

United States v. *Arizona*, 295 U.S. 174 (1935)..... 3

STATUTES:

Constitution of the United States

Art. VI, § 3, cl. 2, The Property Clause 3

Art. I. §, cl. 3, The Commerce Clause 2, 3

Fourteenth Amendment 3

Tenth Amendment..... 3, 4

United States Code

Title 30, § 1252 2

§ 1253 (b) 2

§ 1254(g) 2

§ 1256 2

§ 1257 2

§ 1265(c) 2

§ 1265(e) 2

§ 1272 3

OTHER AUTHORITIES:

Federal Surface Mining Control and Reclamation Act of 1977 2

Title V 2

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BRIEF OF THE STATES OF HAWAII, IDAHO, INDIANA, LOUISIANA, NEBRASKA, NEVADA, OKLAHOMA AND OREGON, AMICI CURIAE, IN SUPPORT OF THE JURISDICTIONAL STATEMENT

INTERESTS OF AMICI CURIAE

The States, appearing as *amici curiae* here, have from the earliest days of their founding exercised the power to regulate the use of private non-federal lands within their borders and to make decisions respecting the development of mineral reserves and other natural resources vital to their progress and prosperity and that of their citizens. The States' powers over lnd and land use, and those integrally related thereto, include the exercise of eminent domain, the enactment of laws for the devolution and free alienation of interests in real estate, the promulgation of zoning and land use statutes and regulations, and the taxing powers of the States, and their counties, cities, municipalities and other political subdivisions.

It need hardly be emphasized that the States have a compelling and overriding interest in the preservation of these integral functions and that they are deeply concerned by the federal government's assertion of pre-emptive or supervening authority with respect to private land use within the States under the guise of legislation purporting to regulate interstate commerce. Accordingly, *amici curiae* respectfully urge that the Court accept jurisdiction to hear and decide the important constitutional question presented by the Jurisdictional Statement of the Commonwealth of Virginia, the Virginia Surface Mining and Reclamation Association and the Town of Wise, Virginia.

QUESTION PRESENTED

Whether the provisions of the Federal Surface Mining Control and Reclamation Act which interpose federal regulatory controls on the use of private non-federal lands within a state constitute a valid exercise of the power of Congress under the Commerce Clause of the Constitution of the United States?[1]

THE QUESTION IS SUBSTANTIAL

Title V of the Federal Surface Mining Control and Reclamation Act of 1977, on its face in explicit terms, and by the description of its sponsors in Congress, is designed to regulate the use of private lands within a state. The Act dictates the terms and conditions under which the states may grant, renew or terminate permits to surface mine coal on private lands, 30 U.S.C. 1252, 1256 and 1257; its pre-empts state statutes and regulations found not to be in conformity with these federal dictates, 30 U.S.C. 1253(b) and 1254(g); it deals extensively with post-mining uses of these private lands, 30 U.S.C. 1265(c) and (e); and it establishes criteria under

[1] The State of Illinois joins in urging the Court to note probable jurisdiction to consider the important constitutional question presented here. Illinois intends to file its own amicus curiae brief on the merits of this case in the event the Court accepts jurisdiction.

which certain land may not be mined for coal and other land must be designated by the States as unsuitable for mining, 30 U.S.C. 1272.

Such land use regulation has historically been the exclusive function of the States, subject only to constitutional limitations against taking of property without just compensation and due process of law under the Fourteenth Amendment. *Penn Central Transportation Co.* v. *New York City,* 438 U.S. 104 (1978). Consequently, the Act raises the critical question whether Congress can effectively amend the Constitution through the simple mechanism of making a legislative finding that the use of land for a particular purpose affects interestate commerce. Such a confiscation of the powers of the States is not constitutionally permissible unless the Tenth Amendment has no force and effect in confrontations with the Commerce Clause.

Though the federal commerce power has been broadly construed to cover local activities related to production of goods for commerce, it has never been extended to authorize local land use regulation. The courts have uniformly held that federal land use powers are limited to those which are derived from the Property Clause of Art. 4, § 3, Clause 2 of the Constitution, *i.e.,* legislative powers over federal lands. *See, Kansas* v. *Colorado,* 206 U.S. 486 (1906). *United States* v. *Arizona,* 295 U.S. 174 (1935); *Federal Power Commission* v. *Oregon,* 349 U.S. 435 (1955); and *Kleppe* v. *New Mexico,* 426 U.S. 529 (1976). If the Commerce Clause is now construed to give the federal government the power to dictate the terms and conditions upon which the States may permit land to be used for surface mining coal, it is self-evident that this same power exists in respect to all uses of land, whether for agricultural, commercial, industrial or mining activities.

Such power would authorize federal land use regulations governing every endeavor which remotely affects commerce. The traditional authority of the States over land use would be significantly curtailed, if not eviscerated. Such an expansion

of federal power to the detriment of the States contradicts this Court's most recent pronouncement on conflicts between the Commerce Clause and the Tenth Amendment, *National League of Cities* v. *Usery*, 426 U.S. 833, 852 (1976). This cannot be condoned because it constitutes a drastic restructuring of the traditional ways in which State and local governments arrange their affairs, and a serious invasion of the sovereign powers of the States. In such a context there can be no limits whatever to federal regulation of land use, and State control of private land uses would for all practical purposes be a dead letter.

CONCLUSION

For the reasons given above, amici curiae respectfully urge that the court note probable jurisdiction.

Respectfully submitted,

WAYNE MINAMI
Attorney General
JOHN H. WONG
Deputy Attorney General
State of Hawaii

DAVID H. LEROY
Attorney General
State of Idaho

THEODORE L. SENDAK
Attorney General
JACK R. O'NEILL
Deputy Attorney General
State of Indiana

WILLIAM J. GUSTE, JR.
Attorney General
CARMACK LACKMON
Assistant Attorney General
State of Louisiana

PAUL L. DOUGLAS
Attorney General
JUDY K. HOFFMAN
Assistant Attorney General
State of Nebraska

RICHARD H. BRYAN
Attorney General
State of Nevada

JAN ERIC CARTWRIGHT
Attorney General
State of Oklahoma

JAMES M. BROWN
Attorney General
State of Oregon

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